No. 76-650

In the Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF NEW MEXICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 537 F. 2d 1102. The pertinent orders of the district court (Pet. Apps. B and C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1976, and a timely petition for rehearing was denied on August 11, 1976. The petition for a writ of certiorari was filed on November 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the water rights of the Pueblo Indians of New Mexico are limited by the doctrine of prior appropriation, or whether the Pueblos are instead entitled to water rights sufficient to meet their present and

future needs under the principles of *Winters* v. *United States*, 207 U.S. 564, and *Arizona* v. *California*, 373 U.S. 546.

2. Whether, in enacting the Pueblo Lands Acts of June 7, 1924 (43 Stat. 636), and May 31, 1933 (48 Stat. 108), Congress preserved the priority of the Pueblo Indians' water rights over any rights acquired by non-Indians under those Acts, and confirmed the inapplicability of the prior appropriation doctrine to the water rights of the Pueblo Indians.

3. Whether the Pueblo Indians may be represented by independent private counsel in addition to the representation provided by the Department of Justice, when the Bureau of Indian Affairs has determined that such supplemental representation is in the best interests of the United States and the Pueblo Indians.

STATUTES INVOLVED

Pertinent provisions of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, and of May 31, 1933, 48 Stat. 108, are set forth in the appendix to the petition at pp. D37 to D47 and F51 to F57.

STATEMENT

This case concerns the water rights of the Pueblo Indians of New Mexico. The merits were heard by the court of appeals as an interlocutory appeal under 28 U.S.C. 1292(b). The action was instituted by the State of New Mexico in 1966 in the United States District Court for the District of New Mexico as a general adjudication of the water rights of claimants to the Nambe-Pojoaque-Tesuque stream system, a small tributary of the Rio Grande in north-central New Mexico. The numerous defendants (more than 1,000) named in this suit are landowners along the stream who claim rights to use water (Pet. App. A2).

Among the defendants originally named by the State in its complaint were four Indian pueblos within the watershed:

Nambe, San Ildefonso, Pojoaque and Tesuque.[1] The United States was also named as a defendant, both because of its ownership of the Santa Fe National Forest, where these streams originate,[2] and because of its fiduciary responsibilities in regard to the four pueblos. To avoid any issue of sovereign immunity, the United States and the four pueblos filed a motion to intervene and were realigned as plaintiffs-in-intervention (Pet. App. A2-A3, G58).

After several years of trial preparation and discovery the State of New Mexico and certain of the private defendants moved for partial summary judgment, seeking a ruling that the water rights of the four pueblos were governed by the doctrine of prior appropriation rather than the reserved rights doctrine established by this Court in *Winters* v. *United States*, 207 U.S. 564; and *Arizona* v. *California*, 373 U.S. 546. The district court initially denied the State's motion, on the ground that the case involved a matter of importance to the public which should not be decided on summary judgment. At the same time, however, the district court indicated that, after trial, it intended to enter a ruling limiting the Pueblo Indians' water rights in strict accordance with the doctrine of prior appropriation (Br. of Pueblo Resp. in Opp., App. 3a[3]).

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[1]The term "pueblo" refers to various separate communities of the Pueblo Indians. Some pueblos include reservations withdrawn from the public domain by statute or executive order; all are centered around lands to which the communities held fee title under grants of the Spanish, Mexican, and United States governments and which the Pueblo Indians occupied originally. See Cohen, *Handbook of Federal Indian Law* 383-384, 395 (1942). However established, pueblos constitute "Indian country" and the Pueblo Indians living there are wards of the United States. *United States* v. *Chavez*, 290 U.S. 357; *United States* v. *Sandoval*, 231 U.S. 28; *United States* v. *Candelaria*, 271 U.S. 432.

[2]This aspect of the United States' interest in the case was not involved in the interlocutory appeal (Pet. 5-6).

[3]Hereinafter cited as "Pueblo App."

After two trial segments before a Special Master, the United States and the four pueblos jointly moved to amend the pretrial order, which had been adopted in 1969, to designate certain additional and substitute witnesses and permit them to present newly-discovered evidence at a final trial segment (Pet. 6-7).[4]

The Special Master before whom trial proceedings had been held approved this amendment, but the district court ruled that the 1969 pretrial order would control and that no new witnesses, documents or other exhibits would be permitted (Pueblo App. 1a-4a). Thereafter, the district court entered an interlocutory order holding that the water rights of the Pueblo Indians "are governed and limited by the doctrine of prior appropriation" (Pet. App. B). The district court also entered an order (Pet. App. C) barring participation in the case by independent private counsel who had been retained by the four pueblos to supplement representation by the Department of Justice.[5] The district court certified the former order for interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. B), and the pueblos appealed the latter as a final order under 28 U.S.C. 1291. The court of appeals reversed both orders (Pet. App. A).

As to the challenge of the United States and the four pueblos to determination of Pueblo Indians' water rights by the prior appropriation doctrine, the court of appeals held

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[4]Several of these witnesses would have presented additional evidence concerning the nature of pueblo water rights under Spanish law (Record on Appeal, Vol. I, pp. 179G-179K, 194A-194N).

[5]The Bureau of Indian Affairs provided the funds for this representation, following a decision by the Commissioner of Indian Affairs that the Pueblo Indians should be provided with independent private counsel to avoid any appearance of a conflict of interest on the part of the United States in such important litigation. As noted, the United States appeared in the case to assert its proprietary interests in the Santa Fe National Forest as well as to represent the Pueblo Indians as its wards (Pueblo App. 11a-13a).

that the Pueblo Indians, like other Indian tribes, are entitled to have their water rights determined under federal law as set forth in *Winters* v. *United States*, 207 U.S. 564, and *Arizona* v. *California*, 373 U.S. 546. The court further rejected petitioners' contention that in enacting the Pueblo Lands Act of May 31, 1933, 48 Stat. 108, Congress had intended to subject the Pueblo Indians to the prior appropriation doctrine. The court of appeals concluded that the Pueblo Indians were entitled to reserved water rights with a priority date of at least 1858, the year in which Congress expressly confirmed their land titles derived from the King of Spain (Act of December 22, 1858, 11 Stat. 374). At trial, the United States and the pueblos had also urged that the Pueblo Indians enjoyed superior water rights under Spanish and Mexican law, and hence that the Pueblo Indians' reserved water rights have a priority dating back to the beginning of Spanish colonization in 1598, when such rights were first recognized by the Spanish Crown. Addressing the refusal to consider evidence not bearing on the prior appropriation doctrine, the court of appeals directed the district court to consider "the evidence already received and in addition that offered by the United States and rejected" (Pet. App. A17). The court also remanded the case for quantification of the Pueblo Indians' water rights, referring the district court to the provisions of this Court's decree in *Arizona* v. *California*, 376 U.S. 340, 344-345, "defining the rights of the Indians" (Pet. App. A19).

In the pueblos' separate appeal on the representation issue, the court of appeals held that in the circumstances they were entitled to independent representation by private counsel (Pet. App. A7).

ARGUMENT

1. The basic issue in this case is whether the water rights of the Pueblo Indians should be limited by the doctrine of prior appropriation, or whether instead their rights should be

governed by the principles decreed by this Court in determining the water rights of other Indian tribes in *Winters* v. *United States*, 207 U.S. 564, and *Arizona* v. *California*, 373 U.S. 546.

New Mexico water law, like that of most western States, is based on the doctrine of prior appropriation. Under that doctrine, water rights are established and maintained solely by actual beneficial use of water, and priority of use gives the higher right. Thus, under New Mexico law, the water rights of competing parties are determined solely with reference to their past water uses (Pet. App. A4).

However, this Court has held that local doctrines of prior appropriation are inapplicable to the water rights of the United States in the performance of its sovereign responsibilities (*United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 703). This includes its duties as guardian for its Indian wards such as the Pueblo Indians (see n. 1, *supra*, p. 3). In *Winters, supra*, the Court held that the Indians of the Ft. Belknap Reservation in Montana were entitled to water from a river bordering their reservation in amounts sufficient for the irrigation of their irrigable lands—without regard to their past use of water. The Court noted that the lands of the reservation "were arid and, without irrigation, were practically valueless," and held that the waters necessary to sustain the Indians on their reservation were "exempt * * * from appropriation under the state laws." 207 U.S. at 576-577. Water uses of non-Indians initiated after the reservation was established were thus subject to the Indians' superior rights.

The Court reaffirmed this principle more recently in *Arizona* v. *California, supra*. There, the Court determined that the five Indian reservations of the lower Colorado River, one created by Act of Congress and four by Executive Order, were entitled to sufficient water to irrigate all their "practicably irrigable" land, with priorities as of the dat the reservations were created. 373 U.S. at 600.

As the court of appeals recognized, these principles are fully applicable to the instant case because there is no reasonable basis for distinguishing the Pueblo Indians of New Mexico, as wards of the United States, from the Indian tribes involved in the Court's previous decisions (see n. 1, *supra*, p. 3). Ever since the United States acceded to sovereignty over the area that is now New Mexico, Congress and the Executive have regarded the Pueblos as Indian tribes properly subject to the exclusive jurisdiction and control of the United States, under Congress' power "[t]o regulate commerce * * * with the Indian tribes." United States Constitution, Article I, Section 8, clause 3. In 1851, Congress extended the provisions of the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, to the Indian tribes of the territory newly acquired from Mexico. Act of February 27, 1851, 9 Stat. 574, 587. The Act of 1834 had prohibited settlement on lands belonging to Indian tribes and provided that the Indians could sell their lands only with the approval of the United States.

Land titles of the Pueblo Indians had long been recognized by the Spanish and Mexican governments.[6] In 1858, the titles of certain Indian pueblos, including the four involved in this case, were confirmed by Congress (Act of December 22, 1858, 11 Stat. 374). However, when the officials of the Indian Department attempted to protect the Pueblo Indians' property by asserting federal laws against trespass on Indian lands, their efforts were frustrated by the territorial courts. These courts held that the Pueblo Indians were outside the protection of federal laws restricting alienation because they were "people living in fenced abodes and cultivating the soil," as opposed to "wild, wandering savages." *United States* v. *Lucero*, 1 N.M. 422, 442. This Court upheld that rationale in *United States* v. *Joseph*, 94 U.S. 614. Thus, the Pueblo Indians, a simple agricultural

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[6]See Cohen, *supra*, n. 1, at 383-384.

people, suffered the disadvantages to which unsophisticated Indians historically have been subject in dealing with acquisitive non-Indians: risk of loss of their holdings by improvident sale or by adverse possession. As a consequence, the Pueblos lost much of their best land during this period.[7]

This process was reversed just before the admission of New Mexico to statehood in 1912. In the New Mexico Enabling Act, 36 Stat. 557, 558, 559 (1910), Congress specified that the term "Indian country" should include "all lands now owned or occupied by the Pueblo Indians," and that such lands should be "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in *United States* v. *Sandoval,* 231 U.S. 28, a prosecution for the introduction of liquor into one of the pueblos. It was argued that Congress had no power to include Pueblo Indian lands within "Indian Country" and thus no power to bar the introduction of liquor therein. The Court held, however, that (231 U.S. at 47):

> [B]y an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and * * * this assertion of guardianship over them cannot be said to be arbitrary, but must be regarded as both authorized and controlling.

[7]Cohen, *supra,* n. 1, at 387-388.

The Court, in substance, overruled its earlier opinion in *Joseph,*[8] and decisively affirmed the government's power to protect the Pueblos from the application of state law.

In *United States* v. *Candelaria,* 271 U.S. 432, 441-442, the Court expressly held that the Pueblos had been among the Indian tribes protected by the 1851 Act,[9] and thus had never been capable of alienating their land:

> While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, "any tribe of Indians." Although sedentary, industrious and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico. A more reasonable view is that the term "Indian tribe" was used in the acts of 1834 and 1851 in the sense of "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya* v. *United States,* 180 U.S. 261, 266. In that sense the term easily includes Pueblo Indians.

[8]The Court stated that its *Joseph* opinion had been "based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available, and with the long-continued action of the legislative and executive departments," and therefore was not controlling. 231 U.S. at 48-49.

[9]Act of February 27, 1851, 9 Stat. 574.

To the same effect is *United States* v. *Chavez*, 290 U.S. 357, recognizing federal jurisdiction to try non-Indians for crimes within a pueblo against Pueblo Indians.

Petitioners' arguments cannot be reconciled with the clear mandate of Congress and this Court that the differences between the Pueblos and other Indian tribes do not justify denying the Pueblos the full benefits of federal protection. Part of that protection is the rule, firmly established by this Court, that Indian tribes whose land the federal government has undertaken to protect are entitled to water rights sufficient to make that protection meaningful. *Winters* v. *United States, supra; Arizona* v. *California, supra.* This principle applies whether the land was a reservation from the public domain, or as is true for the Pueblo Indians, was a historic holding which the United States undertook to guarantee. Thus, the court of appeals correctly held that "[t]he fact that the Pueblos hold fee simple title [to their lands] makes no difference" (Pet. App. A15). Instead the important fact is that "[t]he United States has not relinquished jurisdiction and control over the Pueblos and has not placed their water rights under New Mexico law." *Ibid.* Federal protection would be entirely frustrated unless sufficient water to irrigate the Pueblos' irrigable lands is held "exempt * * * from appropriation under the state laws."[10] Consequently, after the United States assumed responsibility for the Pueblo Indians, no one could, without the express statutory consent of the United States, acquire a right to water superior to the Indians' right to a sufficient supply to meet their needs for

[10] *Winters* v. *United States, supra*, 207 U.S. at 577; cf. *Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800, 805; see also *Cappaert* v. *United States*, 426 U.S. 128.

irrigation and other reasonable uses.[11] *Winters* v. *United States, supra; United States* v. *Rio Grande Dam and Irrigation Co., supra.* Cf. *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162. This result is clearly compelled by this Court's prior decisions in *Sandoval, Candelaria* and *Chavez*, and does not warrant further review.[12]

2. Because petitioners contended that Congress expressly terminated whatever reserved rights the Pueblo Indians might have once enjoyed, the court of appeals also discussed at some length the effect on their water rights of the Pueblo Lands Acts of June 7, 1924 (43 Stat. 636), and May 31, 1933 (48 Stat. 108). In the Pueblo Lands Act of 1924, Congress established an administrative tribunal, the Pueblo Lands Board, to settle the confusion of titles which had resulted from the nineteenth century rulings of the territorial courts (*supra*, pp. 7-8) that the Pueblos were not

[11] The court of appeals suggested that 1858 may be the critical date—the year Congress enacted legislation confirming the Pueblos' land titles. Pet. App. A17. The United States believes that the correct date is at least 1848, when the United States acceded to sovereignty over the area by the Treaty of Guadalupe Hidalgo, 9 Stat. 922. Although the 10-year difference is not of major significance in this particular case, there are other Pueblo Indians whose land titles were not confirmed by Congress until the 1890's. In any future litigation concerning the water rights of those Indians, the government would urge acceptance of 1848 as the controlling date.

In addition, the United States will attempt to establish on remand of this case that the Pueblo Indians were also entitled to reserved rights to irrigate their lands under Spanish and Mexican law. This would establish a priority date for the Pueblos' reserved rights of 1598.

[12] Petitioners disavow (Pet. 17) any claim "that Pueblo Indian water rights derive from the Constitution and laws of the State of New Mexico * * *." Since there is no federal doctrine of prior appropriation, however, the district court would necessarily have to derive the substantive principles of the doctrine from local—New Mexico—law. Petitioners thus seek indirectly to apply to the Pueblo Indians a state law doctrine that they concede cannot be applied directly.

within the protection of federal law. After passage of the New Mexico Enabling Act in 1910 and the *Sandoval* decision in 1913, Congress had to deal with the fact that many non-Indians had acquired or were occupying land within the boundaries of the Indian pueblos and were now clearly in trespass.

The Pueblo Lands Act of 1924 was an exercise of the United States' "sovereign capacity as guardian of said Pueblo Indians." 43 Stat. 636. It provided that non-Indians who had held land within the pueblos for specified periods of time could be confirmed in their titles. The Indians were to be compensated by the United States for the value of the lands thereby lost and "any water right appurtenant thereto." The Pueblo Lands Board was established to determine which non-Indians were qualified to retain their land under the Act and what compensation was owed to each pueblo by the United States.

The work of the Lands Board was extensively reviewed at congressional hearings during 1930 to 1932 and a supplementary Pueblo Lands Act was passed in 1933, 48 Stat. 108. Section 2 of this Act increased the compensation awards to fourteen enumerated pueblos above those adopted by the Board. Because the nature and relative priority of the Pueblos' water rights had been the subject of extensive discussion, both in the reports of the Lands Board and later before the congressional committees, the 1933 Act included the following proviso (Section 9, 48 Stat. 111):

> Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians.

This provision firmly established the intent of Congress that the non-Indians awarded lands under the 1924 Act would not take water rights with a priority equal to that retained by the Indians (Pet. App. A17-A18). Its express language makes clear Congress' intention that its action in adjusting the compensation for the enumerated Pueblos was not in derogation of the Pueblos' rights under the *Winters* doctrine.

The court of appeals correctly rejected petitioners' contention that Congress increased the Pueblos' awards as compensation for the surrender of superior water rights under the *Winters* doctrine. The legislative history conclusively refutes this construction. Section 9 as finally enacted was proposed to the House Committee on Indian Affairs by Mr. Northcutt Ely, a representative of the Secretary of the Interior. He explained to the Committee (Hearings on H.R. 9071 (Authorization of Appropriations to Pay in Part the Liability of the United States to Certain Pueblos) before the House Committee on Indian Affairs, 72d Cong., 1st Sess., 123 (1932):

> Unquestionably, under the awards of this board and the decrees of the court, the Indian has lost certain lands. The question arises as to what water rights he has lost, if any, because of being divested of title to that land. The Pueblo Lands Board has said that he lost only a right to the excess water over and above what he needed upon the land he retained. In other words, he lost a secondary water right and retained a prior and paramount right as to the land he retained.

Congressman Leavitt of Montana then inquired (*id.* at 125):

> How is the difference of opinion on that question of prior and secondary water rights going to be ultimately settled?

Mr. Ely replied (*ibid.*):

> I think it can be settled by incorporating as an amendment to any bill which may come out of here a specific reservation of the priority of the Indians.

Mr. Ely then proposed (*id.* at 127) the precise language which was enacted by Congress as Section 9, recognizing for the Indians "a prior right to the use of water * * * for domestic, stock-water and irrigation purposes for lands remaining in Indian ownership * * * ."[13] Thus, the court of appeals correctly held that those non-Indians whose entitlement to lands within the boundaries of the pueblos stems from the Pueblo Lands Acts are entitled only to such water rights as Congress decreed, namely, water rights secondary to the "prior rights" retained by the Indians.[14]

3. Finally, the United States joins the four pueblos in urging that the court of appeals properly directed the district court to permit participation in this case by their

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[13]The court of appeals properly gave only passing mention to the remarks of Senators Bratton and Cutting of New Mexico, relied on so extensively by petitioners (Pet. 11-14). As the court observed, these Senators "asserted that the Pueblos were entitled to no preferential right." Pet. App. A13. Yet their views were not accepted by Congress as a whole, which instead adopted the plain language of Section 9.

[14]Petitioners contend that under the decision below the Indians in effect received additional compensation for their water rights though they surrendered nothing. The legislative history cited shows, however, that the Pueblo Indians were being compensated because the Board undervalued both their land and the appurtenant water rights. To the extent that the Indians gave up irrigable lands, they necessarily suffered a reduction of their water rights, since those rights extend to all of the Pueblos' practicably irrigable land. *Arizona* v. *California*, *supra*, 373 U.S. at 600. Thus when irrigable lands were confirmed to non-Indians under the 1924 Act, the Indians necessarily lost the right to claim, *pro tanto*, appurtenant water rights.

independent counsel as well as by government counsel. There are distinct roles in this proceeding for government counsel, representing the United States both as guardian and as owner in its own right of significant property within the watershed, and for private counsel, responsible only for safeguarding the interests of the Pueblo Indians. The Bureau of Indian Affairs has determined that it is in the best interests of the United States and the Pueblos for the Pueblos to have independent representation in addition to that provided by the Department of Justice (Pueblo App. 11a-13a). That determination should be respected by the courts. Cf. *Heckman* v. *United States*, 224 U.S. 413, 446; *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365. On remand, the district court is obviously free to make reasonable provision to avoid duplication in the introduction of evidence and the examination of witnesses; thus, there is no reason to review the decision of the court of appeals on this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1977.

DOJ-1977-01